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No. 10-872

In the Supreme Court of the United States

SHAWN FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court's failure to remove two jurors for cause was harmless error when petitioner later removed those jurors with peremptory challenges.

2. Whether the court of appeals correctly held that the district court did not commit plain error when it limited questioning concerning the possible length of a government cooperator's sentence.

3. Whether the court of appeals correctly held that a pretrial detainee has a clearly established constitutional right not to be deprived of liberty without due process of law.

4. Whether the court of appeals correctly held that the evidence was sufficient to support petitioner's conviction for violating 18 U.S.C. 241.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 617 F.3d 873.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2010. A petition for rehearing was denied on September 29, 2010 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on December 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on (1) one count of conspiring to injure, oppress, threaten, or intimidate any person in the free

exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, in violation of 18 U.S.C. 241; (2) one count of depriving another of rights under color of law, in violation of 18 U.S.C. 242 and 2; and (3) one count of knowingly falsifying a document with the intent to impede, obstruct, or influence the investigation or proper administration of the matter that was the subject of the document, in violation of 18 U.S.C. 1519. Pet. App. 32a-33a. He was sentenced to 168 months of imprisonment, to be followed by three years of supervised release. *Id.* at 10a, 35a. The court of appeals affirmed. *Id.* at 1a-31a.

1. a. In the early morning hours of February 14, 2003, petitioner was working as a corrections officer at the Grant County Detention Center (Detention Center). Pet. App. 3a. On duty with him were several other officers, including Shawn Sydnor and Wesley Lanham. *Ibid.* An 18 year-old man named Joshua Sester was brought to the Detention Center that night after being arrested for speeding and eluding the police. *Ibid.*; Gov't C.A. Br. 8. The deputy sheriff who brought Sester to the Detention Center told Sydnor that Sester's car had almost hit an off-duty officer who was Sydnor's friend. Pet. App. 3a. Sester was six feet tall, but weighed only 125 pounds. *Ibid.* He had blond highlights in his hair, wore a bright shirt, and had hearts on his boxer shorts. *Ibid.*

When Sester arrived, Sydnor called other officers, including petitioner, to come to the booking area to look at Sester's hair. Pet. App. 3a. While they were booking Sester, petitioner and other officers teased and laughed at Sester. *Id.* at 3a-4a. The officers told Sester that he looked "like a girl" and a "sissy," and they made fun of his highlighted hair and boxer shorts. *Id.* at 4a. Sydnor

told Sester that he was "cute" and testified that he heard someone tell Sester that he would make a "good girlfriend for the inmates." *Ibid.* Another officer asked Sester "what he was thinking, wearing silk heart shaped boxers in jail on Valentines Day." *Ibid.*

The Detention Center includes separate sections for housing different types of people who are in custody. The Center's standard operating procedure was to house pretrial detainees such as Sester in a detox cell near the booking area. Gov't C.A. Br. 7. General-population prisoners were housed in other areas of the Center, including an area known as 26 Hallway. *Ibid.* The Center had a policy of not housing people who had been arrested for traffic violations—such as Sester—with general-population prisoners. *Ibid.*

In spite of those standard practices, Sydnor told petitioner and Lanham that Sester "needed to be scared" and asked them to find a cell in the general population area for Sester. Pet. App. 4a. In response, Lanham stated (in petitioner's presence) that he "knew a guy"—inmate Bobby Wright—who was housed in Cell 101 "down in 26 Hall." *Ibid.* The inmates housed in 26 Hallway included those convicted of misdemeanors and felonies, and it was commonly known as the "hallway from hell." *Ibid.* A nurse who worked at the Detention Center testified that the inmates housed on 26 Hallway were "almost * * * animalistic." *Ibid.* Twenty-six Hallway had more incidents of sexually predatory behavior among inmates than other areas of the Detention Center, and the Center's staff was aware that 26 Hallway had a reputation for violence. *Ibid.*

Cell 101, which is located in 26 Hallway, housed prisoners who had been convicted of felony offenses. Pet. App. 4a. On the night in question, 12-14 inmates occu-

pied Cell 101. *Ibid.* One of those inmates was Victor Zipp, who was known to be intimidating. *Id.* at 5a. Zipp was often naked and guards had to repeatedly tell him to put his clothes back on. *Ibid.* After Lanham volunteered that he knew an inmate in Cell 101, he and the petitioner went to the cell and spoke with inmate Wright. *Id.* at 5a. Lanham and petitioner told Wright they were going to bring Sester down to Cell 101, and Lanham told Wright they wanted the inmates to "fuck with" Sester. *Ibid.* Petitioner nodded his head as Lanham spoke. *Ibid.* The other inmates standing close to the door reacted with celebration. *Ibid.* Inmates in 26 Hallway were "pretty rowdy" that night in part because earlier they had beaten up an inmate who then had to be removed from the cell by officers including petitioner. *Ibid.* Wright testified that the inmates "were looking for anything to go down again." *Ibid.*

When petitioner and Lanham returned to the booking area, Lanham told Sydnor that he had spoken to Wright and that everything would be "taken care of." Pet. App. 6a. Sydnor and another officer then escorted Sester to Cell 101 in 26 Hallway, where three or four inmates were waiting at the door. *Ibid.* Sester was crying and heard an inmate call out: "Oh, it's Valentine's Day, bring him here. He'd make a good girlfriend." *Ibid.* Other inmates made comments such as: "He's so pretty, bring him in here. We've got a nice spot for him." *Ibid.* Sester testified that he heard one of the guards say: "Here you go boys. I got some fresh meat for you." *Ibid.* A guard pushed Sester into the cell and closed the door. *Ibid.*

When Sester was inside the locked Cell 101, an inmate grabbed him around the arm and led him over to a bed, where inmates stripped off his clothes and slapped

him before taking him into the cell's shower area. Pet. App. 6a. Sester called out for help numerous times, but no one responded. *Ibid.* In the shower area, the inmates threw Sester against the wall in the corner, turned on scalding hot water, and started beating his head against the wall. *Ibid.* Sester then felt a strong pain in his buttocks and believed he was being anally raped. *Ibid.* Eventually, Sester got out of the shower and tried to run towards the door, but he fell on the floor. *Ibid.* Zipp emerged from the shower area naked and told Sester that he would have to submit to either anal or oral sex. *Id.* at 6a-7a. Sester stated he did not want to do either and said no several times. *Id.* at 7a. Zipp then forced Sester to perform oral sex on him until Sester bit down as hard as he could and Zipp withdrew. *Ibid.* After another inmate punched Sester in the head, Sester was left alone. *Ibid.* The guards left Sester in Cell 101 all night without checking on him once. *Ibid.* In the morning, Sester was brought to pretrial services, where he saw the Detention Center's nurse and told her that he "had been traumatized and he had been raped and he had been abused all night long." *Ibid.*

b. During the shift beginning the following night, petitioner and the other officers learned that Sester had been raped and beaten in the cell. Pet. App. 8a. Sydnor fabricated a story to explain the officers' placing Sester in Cell 101. *Ibid.* Sydnor told petitioner and Lanham to say that they moved Sester to a general population cell because the officers needed to decontaminate the detox cells where Sester would otherwise have been placed. *Ibid.* Sydnor also told petitioner and Lanham that they needed to get their stories straight about the previous shift because they all "were in a lot of trouble." *Ibid.* Several officers, including petitioner, filed reports con-

taining false information about the events in question. *Id.* at 8a-9a. Petitioner falsely stated in a report that he and Lanham had passed through 26 Hallway at some point to do a security check. *Id.* at 9a.

2. On January 24, 2008, a federal grand jury returned a seven-count indictment against petitioner, Sydnor, and Lanham. Gov't C.A. Br. 3. The indictment charged petitioner with three counts. First, petitioner was charged with conspiring to injure, oppress, threaten, and intimidate Sester by denying his right not to be deprived of liberty without due process of law, in violation of 18 U.S.C. 241. Gov't C.A. Br. 3-4. The indictment further alleged that the acts committed in furtherance of the conspiracy included aggravated sexual assault. *Id.* at 4. Second, petitioner was charged with depriving Sester of liberty without due process of law, while acting under color of law, by locking Sester into Cell 101, in violation of 18 U.S.C. 242 and 2. *Ibid.* The indictment further alleges that petitioner acted with deliberate indifference to a substantial risk that inmates in that cell would physically assault and otherwise harm Sester, and that the offense resulted in bodily injury to Sester. *Ibid.* Third, petitioner was charged with knowingly falsifying an official report concerning the placement of Sester into Cell 101 with the intent to impede, obstruct, and influence the investigation and proper administration of that matter, in violation of 18 U.S.C. 1519. Gov't C.A. Br. 4-5.

Before trial, Sydnor pleaded guilty and agreed to testify against petitioner and Lanham. Pet. App. 9a. On August 14, 2008, the jury convicted petitioner on all three counts against him. Gov't C.A. Br. 5. Petitioner was sentenced to 168 months of imprisonment, to be

followed by three years of supervised release. Pet. App. 10a, 35a.

3. The court of appeals affirmed. Pet. App. 1a-31a. The court first considered petitioner's argument that he was entitled to a new trial because the district court had abused its discretion in failing to strike two jurors for cause when the jurors expressed doubt about their ability to put aside news reports they had read about the case. *Id.* at 11a. The court of appeals agreed that the district court's failure to strike those jurors for cause was an abuse of discretion, but declined to overturn petitioner's conviction because petitioner failed to demonstrate that he suffered any harm as a result of the district court's error. *Id.* at 11a-13a. The court of appeals found no harm because petitioner and his co-defendant had removed the jurors through the use of peremptory challenges. *Id.* at 12a-13a.

The court of appeals also rejected petitioner's argument that the district court committed plain error in limiting cross-examination of Sydnor, who pleaded guilty before trial and testified against petitioner and Lanham. Pet. App. 13a-16a. When Sydnor testified, the district court instructed defense counsel that, although they could ask Sydnor about his entering a guilty plea with the hope of receiving a shorter sentence, they could not ask questions about the actual length of sentence Sydnor hoped to receive in exchange for cooperating with the government. *Id.* at 13a-14a. Because petitioner did not object to that limitation in the district court, the court of appeals reviewed his challenge under the plain-error standard. *Id.* at 15a. The court noted that there was a "circuit split on the issue of whether defendants should be prohibited from asking cooperating witnesses, and former co-conspirators, details about their sen-

tences and sentencing agreements with the government to expose the witnesses' bias." *Ibid.* In light of the existence of "conflicting authorities," the court held, "the district court could not have committed plain error." *Ibid.*

Finally, the court of appeals rejected petitioner's argument that there was insufficient evidence to convict him of conspiring to violate Sester's rights and of violating Sester's rights under color of law. Pet. App. 16a-20a. The court noted that this Court has held that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Id.* at 17a (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994)). As the court of appeals explained, "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective.'" *Ibid.* (quoting *Farmer*, 511 U.S. at 833). The court further noted that a "prison official can be found guilty where 'the official knows of and disregards an excessive risk to inmate health and of safety.'" *Id.* at 17a-18a (quoting *Ford* v. *County of Grand Traverse*, 535 F.3d 483, 495 (6th Cir. 2008)).

In light of those legal principles, the court of appeals concluded that there was sufficient evidence upon which to convict petitioner of "the relevant statutes." Pet. App. 19a-20a. The court explained that petitioner "taunted [Sester], joined Lanham in taking action to solicit inmates to harm [Sester], failed to check on [Sester] throughout the five hours he was in Cell 101, and then joined in the cover up of his assault." *Id.* at 19a. The court thus held that the jury had a sufficient basis to conclude that petitioner intentionally joined the conspiracy to place Sester "in a general population cell

to 'scare' him" and that petitioner "failed to protect or assist [Sester] after learning of the plan." *Ibid.*

ARGUMENT

Petitioner repeats his arguments that his conviction should be reversed because the district court erred in failing to excuse two jurors for cause, because the district court erroneously restricted petitioner's ability to cross-examine a cooperating co-conspirator, and because there was insufficient evidence to convict petitioner of violating or conspiring to violate Sester's clearly established rights. The court of appeals correctly rejected each of petitioner's arguments and there is no conflict between the court of appeals' decision and any decision from this Court or from any other court of appeals that warrants review by this Court.

1. Petitioner first argues (Pet. 11-16) that the district court's refusal to strike two jurors for cause at the request of petitioner and his co-defendant, combined with the court's agreeing to strike a third juror for cause at the request of the government, violated his rights under the Due Process Clause. His argument is without merit.

The court of appeals found that the district court abused its discretion by failing to strike Jurors 56 and 143 for cause after they expressed doubt that they could be impartial. Pet. App. 11a-12a. The court correctly concluded, however, that such an error did not warrant reversal of petitioner's conviction because petitioner and his co-defendant had removed those jurors through the use of peremptory challenges. *Id.* at 12a-13a. As the court of appeals noted, *id.* at 12a, this Court held in *United States* v. *Martinez-Salazar*, 528 U.S. 304, 307 (2000), that, when a defendant "elects to cure" an erro-

neous refusal to strike a juror for cause "by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." There is no reason for this Court to review the court of appeals' straightforward application of that holding to petitioner's case.

Nor does the district court's removal of a potential juror for cause at the request of the government change the proper application of the rule announced in *Martinez-Salazar*. The court correctly struck that juror because of the juror's long-term professional relationship with one of the defense attorneys. Petitioner suggests (Pet. 14) that the district court "deliberately misapplied the law in order to force [petitioner] to use a peremptory challenge to correct the court's error," 528 U.S. at 316, by applying one standard to defendants' motions to strike for cause and another to the government's motions to strike for cause. But that contention finds no support in the record. The reasons given for seeking the removal of the jurors in question were not the same. Petitioner sought the removal of jurors who expressed doubts about their ability to judge impartially but who ultimately stated that they believed they could; the government sought (and obtained) the removal of a juror whose professional relationship to defense counsel on its face called into question her impartiality. See Pet. App. 10a-13a. The district court's different conclusions about whether to strike the jurors in question does not suggest that it applied a different standard to motions to strike for cause from petitioner than to such motions from the government. Nor does petitioner offer any support for his suggestion (Pet. 14) that the district court "deliberate[ly] misappli[ed]" the law.

Petitioner also cannot establish that he suffered any harm as a result of the district court's refusal to strike for cause two jurors whom petitioner then removed with peremptory challenges. Although he complains (Pet. 15) that he was forced to choose between allowing two potentially biased jurors to sit on the jury and using peremptory challenges to remove them, this Court held in *Martinez-Salazar* that such a choice does not amount to a violation of any constitutional or rule-based right. 528 U.S. at 310-317; *id.* at 315 ("A hard choice is not the same as no choice."). Petitioner does not even attempt to explain how he would have used his strikes differently, on what basis he would have done so, or how different choices would have affected the verdict. Petitioner and his co-defendant received all of the peremptory challenges they allowed under Federal Rule of Criminal Procedure 24(b)(2) and petitioner does not even allege that he had to use all of his peremptory challenges in order to keep Jurors 56 and 143 from sitting on his jury. Nor has petitioner ever claimed that the district court's error resulted in the seating of a biased or otherwise unqualified juror. See *Martinez-Salazar*, 528 U.S. at 307 (peremptory challenges "are not of constitutional dimension" but are "one means to achieve the constitutionally required end of an impartial jury").

Finally, petitioner does not assert that his case implicates a division of authority among the courts of appeals. Although he purports to rely (Pet. 13) on the Sixth Circuit's decision in *Wolfe* v. *Brigano*, 232 F.3d 499 (2000), the court of appeals correctly concluded that that decision is inapposite because the jury empaneled in that case included four biased jurors who actually participated in the trial. Pet. App. 13a. Further review of the

court of appeals' correct application of this Court's binding precedent is not warranted.

2. Petitioner asserts (Pet. 16-22) that the Confrontation Clause prohibits district courts from limiting a defendant's cross-examination of a cooperating witness about the magnitude of the sentence reduction he received as a result of his cooperation. Because petitioner failed to raise this argument before the district court, the court of appeals properly reviewed it under the plain-error standard. To prevail on plain-error review, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (citation omitted); see, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Petitioner cannot make that showing because no error was committed in this case. In addition, even if there were error, it was neither "clear" nor "obvious." Cf. *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are split); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006). Although there is some disagreement in the courts of appeals about this question, petitioner overstates the extent of those differences. Petitioner cannot establish that he suffered prejudice as a result of the district court's ruling and has not even attempted to establish the existence of any error that seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

a. The court of appeals correctly held that the district court's restriction of petitioner's ability to question Sydnor about the length of sentence he expected to face did not constitute plain error. As this Court has found, "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-679 (1986). This Court has recognized, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679.

In this case, the district court limited questioning on the length of the sentence Sydnor hoped to receive in exchange for his cooperation or the length of the sentence he might have been subjected to if he had proceeded to trial and been convicted. 8/11/2008 Tr. 7-8. But the court made clear that "the parties would be able to certainly ask questions about the defendant entering a plea [of] guilty in exchange for hoping to receive a lesser punishment." Pet. App. 14a. The court also made clear that its imposition of the limitation in question was intended to prevent the jury from learning about the potential length of sentence petitioner and his co-defendant faced if convicted. Tr. 7-8.

The district court's ruling was a permissible exercise of its discretion. The information that petitioner sought to elicit was highly prejudicial because petitioner himself was charged with many of the same crimes that Sydnor had originally been charged with before agreeing to plead guilty. Permitting cross-examination about

the potential sentences associated with those charges would have informed the jury of the sentences that would have followed if petitioner were convicted, thereby creating a significant risk of prejudice to the government. See *Shannon* v. *United States*, 512 U.S. 573, 579 (1994) ("[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."); Tr. 7-8 ("Of course, it's proper to ask if a witness anticipates that he'll receive a lesser penalty as a result of entering a plea of guilty, but, again, it is the province of the Court to impose penalties."). Counsel for petitioner and his co-defendant were permitted to probe into Sydnor's potential biases, his hopes for a considerable reduction in his sentence based on his cooperation and testimony, his dismissed charges, or the timing of his plea agreement—and they did so. See Gov't C.A. Br. 34-35. In addition, the district court properly instructed the jury to consider Sydnor's testimony with caution and care, and counsel for petitioner and his co-defendant argued in closing that Sydnor had strong motivation to lie in order to gain a reduced sentence. *Id.* at 35. The district court reasonably balanced the risk of prejudice against the limited probative value of the evidence in deciding to limit petitioner's questioning. The court's fact-intensive exercise of discretion does not warrant this Court's review.

b. Even if the district court did err in restricting petitioner's ability to question Sydnor about the length of sentence he expected to face, compared to the length of sentence he could have faced if he had not cooperated, any error was not plain. As petitioner notes (Pet. 19-22), different courts of appeals have reached different con-

clusions about whether it was appropriate for a district court in a particular case to limit a defendant's ability to cross-examine a cooperating witness about the magnitude of the sentence reduction he hoped to receive by testifying. Compare *United States* v. *Arocho*, 305 F.3d 627, 636 (7th Cir. 2002) (upholding limitation on questions concerning the specific sentences and sentencing guidelines the cooperators faced because the defendants "were able to elicit sufficient information to allow the jury to assess" the cooperators' "credibility, motives and bias"); *United States* v. *Cropp*, 127 F.3d 354, 358 (4th Cir. 1997) (upholding district court's ruling "that the defense could not ask about the specific penalties that the cooperators would have received absent cooperation, or about the specific penalties they hoped to receive due to their cooperation"), cert. denied, 522 U.S. 1098 (1998); *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995) (upholding limitation on question about the number of years cooperator would have faced on dismissed charge when cooperator was asked "repeatedly whether he had received any benefit for his testimony"); with *United States* v. *Chandler*, 326 F.3d 210, 221 (3d Cir. 2003) (limitation was error because "the jury might have 'received a significantly different impression of [witnesses'] credibility'"); *United States* v. *Roan Eagle*, 867 F.2d 436, 443-444 (8th Cir.) (noting that inquiry into the terms of a cooperating defendant's plea agreement "is essential" to effective cross-examination, but finding error to be harmless because the cooperating witness's credibility "was not really an issue"), cert. denied, 490 U.S. 1028 (1989).

In light of the arguably different results that have arisen from courts of appeals' fact-bound resolution of particular claims, the court of appeals correctly held

that any error was not sufficiently obvious to satisfy the plain-error standard. Whether a particular limitation on cross-examination constitutes error depends on case-specific questions such as the degree to which the defendant was otherwise permitted to inquire about a witness's plea agreement, the importance of the witness, and the extent to which the witness's credibility was at issue. District courts cannot be held to have committed obvious error when different courts of appeals may weigh those facts differently. And a case that reaches this Court on plain-error review would not be a suitable vehicle for this Court to use in order to clarify the law.

c. Even assuming that the district court's decision to restrict cross-examination were plainly erroneous, petitioner did not suffer any prejudice as a result. The district court accorded petitioner ample latitude to explore Sydnor's possible motives and biases, giving petitioner and his co-defendant more than adequate opportunity to thoroughly impeach Sydnor's testimony. Cf. *United States* v. *Hoyte*, 51 F.3d 1239, 1243 (4th Cir.) (finding a lack of prejudice from the failure to disclose a witness's prior inconsistent statement, because the witness "was impeached in so many other ways"), cert. denied, 516 U.S. 935 (1995). In addition, because Sydnor's testimony was corroborated by testimony of other witnesses (including the victim, an inmate, and other detention officers), thereby independently establishing petitioner's guilt, any error was harmless. See Gov't C.A. Br. 5-17.

d. Finally, petitioner makes no effort to establish that the alleged error substantially impaired the fairness, integrity, or public reputation of judicial proceedings. Indeed, the petition does not even mention the plain-error standard. Further review is not warranted.

3. Petitioner also argues (Pet. 23-31) that his conviction for violating 18 U.S.C. 242 by depriving Sester of his rights under color of law must be overturned because the constitutional right of a pretrial detainee to be free from punishment (including violence at the hands of other inmates) was not "established with sufficient clarity." The court of appeals correctly rejected that argument and that decision does not warrant review by this Court.

As the court of appeals noted, prison officials "have a duty . . . to protect prisoners from violence at the hands of other prisoners"; officers may not simply allow "nature [to] take its course." Pet. App. 17a (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994)). The court of appeals correctly relied on this Court's statement in *Farmer* that "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective.'" *Ibid.* (quoting *Farmer*, 511 U.S. at 833). Thus, a prison official violates an inmate's rights when "the official knows of and disregards an excessive risk to inmate health or safety." *Terrance* v. *Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002) (quoting *Farmer*, 511 U.S. at 837). This Court has also held that punishment of a pretrial detainee (such as Sester) is not a legitimate penological purpose under the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979).

Given the clear holdings of this Court and the Sixth Circuit that a pretrial detainee may not be subject to punishment of any kind and that a prison guard may not display deliberate indifference to the risk that an inmate will be injured at the hands of other inmates, petitioner was on notice of the constitutionally suspect nature of his actions. Petitioner does not even suggest that the

courts of appeals disagree about whether such a constitutional right is established. To the extent that petitioner's argument boils down to a claim that the government did not present sufficient evidence that petitioner did in fact intend to punish Sester or that he was in fact deliberately indifferent to the risk of harm Sester faced, that fact-bound issue does not warrant review by this Court. In any case, the government presented ample evidence that petitioner did violate Sester's rights while acting under color of law. Pet. App. 19a. For example, the evidence established that petitioner actively took steps to allow inmates to punish and harm Sester. See Gov't C.A. Br. 10-12. The evidence also established that petitioner was aware of the substantial risk of harm to Sester in Cell 101 and of his responsibilities in light of that risk. See *id.* at 6-7, 10-11, 16-17.

4. Finally, petitioner argues (Pet. 32-36) that the evidence presented at trial was not sufficient to establish that he conspired with other guards to deprive Sester of his rights, in violation of 18 U.S.C. 241. Petitioner is incorrect. The evidence showed that petitioner taunted Sester, joined with Lanham in taking action to solicit inmates to harm Sester, failed to check on Sester throughout the five hours he was in Cell 101, and then joined in the cover-up after the rape and beating. See Gov't C.A. Br. 12, 15, 18-19. Sydnor testified that he told both petitioner and Lanham of his plan to scare Sester and that petitioner did not object to the plan. See *id.* at 10. Corrections Officer Wendy Guthrie also testified that petitioner was present during the discussion of the plan to scare Sester. See *ibid.* In addition, inmate Wright testified that petitioner and Lanham came to the door of Cell 101 and spoke with him. See *id.* at 12. Wright testified that, when Lanham told Wright that

they wanted Wright to "fuck with" Sester, petitioner was standing at the door nodding his head. See *ibid.*

In any case, review by this Court of the fact-bound issue of whether there was sufficient evidence to prove that petitioner was involved in the conspiracy is not warranted. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Petitioner does not allege that his sufficiency claim implicates any broader legal principle and does not identify any disagreement between the court of appeals' decision and any decision of this Court or any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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